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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 693.

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

vs.

B. A. ROBINSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opposing the Petition for Certiorari, Respondent says:

Petition Completely Lacking in Merit.

This action under the F. E. L. A. arose because Petitioner negligently brought two interstate trains together in head-on collision, causing injuries to Respondent, a brakeman, who jumped from one of the moving locomo-

tives before the head-on. The Petition, 9, concedes "that the sole issue, other than a general denial, was to the extent of any injuries received by Respondent. * * *." A twelve-man-and-woman jury unanimously determined that "sole issue". The case is just that simple.

Although represented by able Texas trial counsel, the Railroad deliberately chose to ignore the Texas practice (by Supreme Court Rules) requiring the Assignments of Error for appeal to be incorporated in a Motion for New Trial (to allow the trial judge sober reflection on his rulings during the heat of battle), and contented itself with filing a so-called motion for new trial containing no specific assignments (Transcript 20) in the very teeth of a Texas Supreme Court Rule declaring it not worthy of consideration—see Rule 322 (Petition 5).

Petitioner then boldly appealed without assignments of error, asserting error in the action of the trial judge in using the empanelled civil jury to try a criminal case (Petition 18), and asserting excessiveness in the amount of the verdict (Petition 29). The Texas Court of Civil Appeals first applied Rule 322, as was its duty (Petition 26); but nevertheless took up, carefully considered, and overruled the two points of error so asserted, and went even further by examining "the record" but was unable to discover any "error that could have been raised" by the Railroad, even had it filed an "amended motion for new trial" that "would justify a reversal of this case." (Petition 29).

Still asserting the same points (by now expanded to three), the Railroad was denied a writ of error by the Texas Supreme Court; and then, on motion for re-hearing of its application for writ of error, by formal assignment only, and without supporting authority or argument, Peti-

tioner suddenly asserted Texas had been wrong all along in applying what Petitioner denominated the "strict rules of Texas Procedure in contravention to decisions of the Supreme Court of the United States repudiating State Court Rules in Federal Employer's Liability Act cases." If this could be considered as the assertion of a Federal right, it,

(1) Was an incorrect statement of the law, this Brief 6;

(2) Came too late, this Brief 9; and

(3) Ignored the Texas Courts' decisions on the *merits*, this Brief 8.

The magic words "Seventh Amendment to the Constitution of the United States" appear for the *first* time in this case, in the Petition for Certiorari. They avail Petitioner nothing, because,

(1) Petitioner *had* a trial by jury, instead of being *deprived* of it (Tr. 16);

(2) The jury was fairly constituted, this Brief 11 and 12; and

(3) If the jury should not have been used in the criminal case (a) Petitioner's objection was waived because it came too late, this Brief 13, and, (b) The error was harmless, because *Respondent's* counsel was identified as attorney for the rapist (Tr. 32), and the "inflaming" and "arousing" (Petitioner's Brief 21) of the jury would have been directed at Respondent's counsel and Respondent, *not* Petitioner and its counsel.

It will be seen, therefore, that far from a decision by the state courts of "a federal question of substance", Rule 19 for this Court, there was no decision of *any* federal question, substance or otherwise; and, it is respectfully submitted, what *was* decided by State courts should meet

with this Court's approval. The Petition is frivolous. If further elaboration is required, however, we invite the Court's attention to the following:

Misstatements and Inaccuracies in Petition and Brief of Petitioner.

Counsel who signed the petition for certiorari did not participate in the trial of this case, and this apparent unfamiliarity with the record must account for the inaccuracies and misstatements in the petition and brief. They are:

(a) Under "Questions Presented" (Petition 3), the statement that there was a "hung jury" in the criminal case is erroneous. The *ipse dixit* statement of railroad counsel in the motion for nistrial (Tr. 32), that the jury was "unable to agree" did not make the jury "hung", because the jury was recalled while still deliberating; but if counsel was trying to say that, then the statement directly conflicts with the certificate of the trial judge that he "promptly recalled the jury before it reached a verdict" in the criminal case and "discharged" it from that case "as soon as Mr. Bowman (petitioner's trial counsel) apprised the Court he desired to make an objection to the proceedings in the Criminal case" (Tr. 35).

(b) Under "Statement—Material Facts" (Petition 9), it is stated that Bill of Exception No. One "is here (in the Petition) quoted in full". This is erroneous. The trial judge's *qualification* of the Bill as presented to him is entirely omitted from the quotation in the Petition for Certiorari, pp. 9-15). The qualification is a vital part of the Bill of Exceptions (See authority cited this Brief p. 14).

(c) Under the same "Statement" (Petition 16), it is stated that "there is no claim that the attorney for Peti-

tioner consented or agreed to the use of the jury in the criminal case." The same statement is made in Petitioner's brief, p. 13. But the record shows that Petitioner's trial attorney "was present in the courtroom at the time all proceedings in the above mentioned criminal case were had and made no objection to the proceedings in the criminal case whatever until after the jury retired to consider its verdict" (Tr. 35).

(d) Respondent, of course, considers that the last paragraph of p. 16 of the Petition, and the first four paragraphs of p. 17 (repeated in brief of Petitioner, p. 14), are no part of the "Material Facts" as described by Petitioner, but are simply inserted in a desperate effort to prejudice this Court against Respondent. No claim of excessiveness was properly assigned below, and the claim as made was rejected. No such claim is assigned here at all. We do not dignify the assertions referred to by answering them.

(e) The statement, last paragraph (Petition 17) (reiterated, last paragraph, Brief 20), that the intermediate Texas Appellate Court affirmed on the procedural failure of the railroad to properly preserve its claimed errors hardly rises to the level of a half-truth. Reference to the opinion of the Texas Court of Civil Appeals readily demonstrates that after holding that the railroad had failed to follow the procedural rules for preserving claimed error, that Court went further and passed directly on (and overruled) both points of error presented to it (Petition 26-29), and went even further by "carefully" examining "the record", in spite of which that Court could discover "no error that could have been raised" by the railroad "in an amended motion for new trial that would justify a reversal" of the case (Petition 29).

(f) The statement that the Motion for Mistrial (Tr. 10), was "instantly" made (Brief 25), is not true. See Tr. 35.

ARGUMENT.

I.

Petitioner's Failure to Comply with Texas Procedural Rules Fatal to Its Appeal.

Rule 374, Tex. Rules Civil Procedure states:

> "The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required, shall be considered as waived."

So also the "statement of the points upon which the appeal is predicated" is required to be "germane to one or more assignments of error when assignments of error are required," and it is further directed that the assignments should be cited by "reference (only)", Rule 418, T.R.C.P. Clearly, under Rule 322, cited by Petitioner in its Petition 5, the only motion for new trial filed by petitioner was legally insufficient under Texas practice. It therefore went to the Texas Court of Civil Appeals, without any vehicle for appeal, except fundamental error. Petitioner is not contending that there was any fundamental error in the case. But, it blandly brushes these obstacles aside by its assertion that the Texas Courts "in a trial of a Federal Employers' Liability Act case may not invoke strict rules of procedure * * *". (Brief, p. 24).

We agree with Petitioner that a *Federal right, asserted* under the Employers' Liability Act, cannot be taken away under the guise of local practice and procedure. But that is an entirely different proposition from the one here

presented that local practice and procedure is swept away merely because the action arose under a federal statute. Mr. Justice Pitney long ago said in *Chesapeake & O. R. Co. v. DeAtley*, 241 U.S. 310, 36 S. Ct. 564, 60 L. Ed. 1016, 1021:

> "Although the Federal action was based upon a federal statute (F. E. L. A.), it was triable and tried in a state court; hence, local rules of practice and procedure were applicable. *Central Vermont R. Co. v. White*, 238 U.S. 507, 511, 59 L. Ed. 1433, 35 S. Ct. 865, 9 N.C.C.A. 265; *Minneapolis & St. L. R. Co. v. Bombolis*, # 478, this day decided (241 U.S. 212, *ante* 961, 36 S. Ct. 595)."

Here, bear in mind that no federal right was ever even *claimed* until at least the motion for rehearing on application for writ of error to the Supreme Court of Texas, and no claim of constitutional infringement was made until this Petition for Certiorari. Under these circumstances, the case of *Atlantic Coast Line R. Co. v. Mims*, 242 U.S. 532, 61 L.Ed. 476, 37 S. Ct. 188, 17 N.C.C.A. 349, is considered directly in point. The action had been brought by the plaintiff under the theory that the death of the intestate occurred in intrastate commerce, and the action was therefore brought under a South Carolina statute in a state court there. The case went to the Supreme Court of South Carolina, was reversed and sent back for a new trial, and the plaintiff put on her proof without the question of interstate commerce ever having been raised at which point, the railroad offered to prove that the deceased was engaged in interstate commerce at the time of his death. The trial court rejected this proffer of testimony on the ground that it came too late and was not relevant to any issue tendered by the pleadings. No application was made for leave to amend by adding the claim under federal law. In this situation, Your Honors held:

"While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet, the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of " by the State Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review (*Baldwin* v. *Kansas*, 129 U.S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 41 L. Ed. 1149, 17 S. Ct. 709)."

II.

The Texas State Courts Considered Petitioner's Case on Its Merits.

After first holding that the railroad was before it without assignments of error, the Texas Court of Civil Appeals in its opinion, went further, took up both assignments presented by the railroad in its brief to that Court (neither of which involved a federal question), and overruled them on their merits; and the court then, with the utmost spirit of fairness and candor, examined the entire record in an attempt to find some error or mistake which could have been the basis for an appeal, but found none. On this record, the Texas Supreme Court refused the application for writ of error, N.R.E.; and it seems manifest, that without regard to the failure of the railroad's experienced and skilled Texas trial counsel to comply with the Texas Rules of Civil Procedure in the appeal of his case, the appeal was found to be totally without merit, on any ground presented.

III.

Petitioner Has No Right of Review, Because Claim of Federal Question on Application of State Court Procedure Was Raised for the First Time in Petition for Rehearing on Application for Writ of Error in Texas Supreme Court, and Claim of Constitutional Infringement First Made on This Petition for Certiorari.

It is "elementary that a Federal question may not be imported into a record for the first time by way of assignments of error made for the purposes of review by this (Supreme) court", *Manhattan L. Ins. Co.* v. *Cohen*, 234 U.S. 123, 34 S. Ct. 874, 58 L. Ed. 1215, 1253; and this Court is without jurisdiction, in reviewing a State Court's decision, to consider a Federal question not passed upon by the State Court nor properly presented to it for decision, *Congress of I. O.* v. *McAdory*, 325 U.S. 472, 65 S. Ct. 1395, 89 L. Ed. 1741, 1745.

Considered in point is *McCorquodale* v. *Texas*, 211 U.S. 432, 29 S. Ct. 146, 53 L. Ed. 269. There, an attempt to raise a federal question was first made in a motion for rehearing filed with the Texas Court of Criminal Appeals, the Texas court of last resort in criminal matters. The motion for rehearing was denied in language almost identical with language used by the Supreme Court in the present case in denying Petitioner's motion for rehearing on application for writ of error (See Petition 35). Mr. Justice McKenna said:

> "This Court has decided many times that it is too late to raise a federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision (Citing cases). It is true that we have also decided that, if the court entertains the motion and

passes on the federal question, we will review its decision. But it must appear that the court has done so (Citing cases). It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion."

In fact, even where the order of the state court of last resort recites "mature consideration", it cannot be said that the court passed on the federal question asserted (See *Forbes* v. *State Council*, 216 U.S. 396, 30 S. Ct. 295, 54 L. Ed. 334; and *Consol. Turnp. Co.* v. *Norfolk and O. V. R. Co.*, 228 U.S. 326, 33 S. Ct. 310, 57 L. Ed. 857).

We cite the following additional cases, several of which involved a claim of Federal Constitutional infringement: *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 236; *Chicago, F. & L. R. Co.* v. *McGuire*, 196 U.S. 128, 25 S. Ct. 200, 49 L. Ed. 413, 415, and the annotation found 49 L. Ed. 413; *Rooker* v. *Fidelity Trust Co.*, 261 U.S. 114, 43 S. Ct. 288, 67 L. Ed. 556, 557, and the annotations, 67 L. Ed. 556; *Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 65 S. Ct. 1480, 89 L. Ed. 2092, 2100; *Herndon* v. *Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, 1532, and the annotations, 79 L. Ed. 1530.

Bear in mind also, that the Texas Supreme Court, under its own Rules, *could not* consider the supposed Federal question, first presented on motion for rehearing on application for writ of eror, since such Federal question had neither been presented to the trial court by motion for new trial nor assigned as error on motion for rehearing in the Court of Civil Appeals, all as required by Texas Rule of Civil Procedure 469 (c). Compare *Congress of I. O.* v. *McAdory*, 89 L. Ed. 1741, 1745.

It will be noted, that the claim that Texas Procedural Rules did not apply to this F. E. L. A. case, was first asserted on motion for rehearing of the application for writ of error after the original denial of same, which was too late under the above authorities; and that the claim of constitutional infringement of the Seventh Amendment was first raised by this petition for certiorari. The state courts were accordingly denied all opportunity by Petitioner to pass on its alleged Federal questions. They come too late here, and the foregoing cases by this Court clearly so hold.

IV.

The Seventh Federal Constitutional Amendment Was Not Infringed by the Trial Judge's Use of the Jury to Dispose of a Criminal Matter.

Petitioner attempts to twist the Seventh Amendment guarantee of trial by jury into a guarantee against what it calls "a disturbed and inflammatory jury" (Petition 18). This will not do.

The cases cited in the opinion of the Court of Civil Appeals, are very much in point in upholding the action of the trial judge in this instance in using the F. E. L. A. jury to hear a criminal matter and include one Federal case from the District of Columbia. We have no doubt from experience that U. S. trial judges empanel the personnel of one jury venire in two or more cases regularly. They must do so to dispatch the business of their courts just as the trial; judge here was trying to do. But in any event, Petitioner, while not necessarily disagreeing that the trial judge in the present case could have used the jury on a simple forgery or burglary case, asserts that the rape case here involved was "a case of such revolting nature" that it "could not help but arouse the indignation of this jury and particularly the women members of the jury."

(Brief of petitioner, p. 20). Well, to begin with, the indignation must have been directed against Woodard, the confessed rapist, and it fell to the lot of Mr. Chapman, one of Respondent's attorneys, under his duties as officer of the Court by appointment, to defend this self-confessed rapist, who aroused such indignation. How that could have harmed the Railroad, it does not explain. Petitioner has no complaint by assignment at the excessiveness of the verdict; yet, its Brief, p. 21, seems to assert that harm was done it by "the size of the verdict". It wants this Court to consider something it has not legally asked the Court to consider; and, of course, the verdict was not excessive, as the Court of Civil Appeals directly held (Petition 29).

It will not do, as Petitioner attempts (Brief 24), to brush aside the cases supporting the action of the trial judge in this case by saying they "occurred many years ago". They were and are authoritative, and they were the standards by which the trial court acted as a trial court always must. In any event, the law on the point is now settled so far as Texas is concerned, by the appellate approval of the trial judge's action here.

V.

Petitioner Had Trial by Jury. The State of Texas Infringed No Federal Right of Petitioner in Granting Jury Trial According to Its Determination of What Constituted a Fair Jury.

The Seventh Amendment only guarantees Petitioner a trial by jury. It *had* trial by jury. That ought to end the inquiry; but we go further:

We confidently assert that the right of trial by jury, guaranteed by the Seventh Amendment, does not require

a state court, when enforcing rights granted under the Employers' Liability Acts, to grant jury trial according to the course of the common law, but only to grant such jury trial by uniformly applying the law of the State as to what constitutes a fair and impartial jury. It will be borne in mind that the state courts below have held the jury in the present case to have been fairly constituted, and that determination is the law of the case so far as Texas is concerned, for this case and all others like it.

In *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961, Ann. Cas. 1916E, 505 L.R.A. 1917A, 86 (and its accompanying cases, *Chesapeake & O. R. Co.* v. *Gainey*, 241 U.S. 494, 36 S. Ct. 633, 60 L. Ed. 1124; *Chesapeake & O. R. Co.* v. *Kelly*, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1117, L.R.A. 1917F, 367; *St. L. & S. F. R. Co.* v. *Brown*, 241 U.S. 223, 36 S. Ct. 602, 60 L. Ed. 966; *Chesapeake & O. R. Co.* v. *Carnahan*, 241 U.S. 241, 36 S. Ct. 594, 60 L. Ed. 979, and *Louisville & N. R. Co.* v. *Stewart*, 241 U.S. 261, 36 S. Ct. 586, 60 L. Ed. 989), it was asserted, in F. E. L. A. cases, that state statutes allowing certain types of majority verdicts in civil cases conflicted with the Seventh United States Constitutional Amendment granting the jury trial known to common law. This Court, while conceding the validity of the argument that the jury known to common law was a jury which concurred unanimously in its verdict, nevertheless held that the Seventh Amendment was not infringed when a state court, in F. E. L. A. cases, substituted its own concept of jury trial by allowing majority verdict. Mr. Justice Reed, in *Brady* v. *Southern R. Co.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239, 242, summed up the rationale of these cases by pointing out:

> "It is true that this Court has held that a state need not provide in F. E. L. A. cases any trial by jury

according to the requirements of the Seventh Amendment (Citing the *Bombolis* case)."

If therefore, Respondent conceded (as he certainly does not) that the use by a Federal trial judge of a duly empanelled F. E. L. A. jury to dispose of criminal business on his docket would constitute that jury "unfair and partial", it by no means follows that the state of Texas would be required to concede that a jury so drawn according to state usages would become unfair and partial. The state of Texas had determined that this was a fair and impartial jury under its concepts; and there being nothing unreasonable about that determination, this Court and Petitioner are bound by that finding.

VI.

Petitioner Waived Any Complaint at the Action of the Trial Court in Using the Jury in the Criminal Case.

Railroad appellate counsel's unfamiliarity with the record causes him to completely omit the qualifications of the trial judge to the Bill of Exceptions, said to be "quoted in full", in the Petition. As said by the Texas Supreme Court in *Texas Textile Mills* v. *Gregory*, 142 Tex. 308, 177 S.W. 2d 938, 940:

> "It is the settled law that when a party accepts a bill of exceptions qualified by the trial court, the qualifications become a part of the bill itself, and are binding on the party who accepts and files the same. *San Antonio Traction Co.* v. *Settle*, 104 Tex. 142, 135 S.W. 116; *M. System Stores, Inc.*, v. *Davenport*, Tex. Civ. App., 36 S.W. 2d 243; *South Texas Cotton Oil Co.* v. *Bough*, Tex. Civ. App., 68 S.W. 2d 539; 3 Tex. Jur., p. 657, Sec. 464." (See also *Tucker* v. *Slovacek*, Tex. Civ. App., 234 S.W. 2d 254, er. ref. n. r. e; *Craddock* v. *Humble Oil & Ref. Co.*, Tex. Civ. App., 234 S.W. 2d

137, er. ref. n. r. e.; *Harris* v. *Cochran*, Tex. Civ. App., 288 S.W. 2d 814, er. ref. n. r. e.; *Taylor* v. *Taylor*, Tex. Civ. App., 272 S.W. 2d 636, er. ref. n. r. e.; and *Cavaness* v. *General Corp.*, 272 S.W. 2d 595, 600, affirmed 283 S.W. 2d 33).

The qualification to the Bill shows that a jury could not be waived, this being a capital crime; that trial counsel for the Railroad was present in the courtroom at the time all proceedings in the criminal case were had and made no objection to the proceedings in the criminal case whatever until after the jury retired to consider its verdict; that as soon as the railroad made a motion for mistrial, the Court recalled the jury before it had arrived at a verdict and discharged it; and that had an objection been made to the criminal proceedings at the time of its beginning, the Court would have sustained such objection and would have proceeded no further in the criminal matter (Tr. 35).

Bear in mind that Petitioner's trial counsel was a skilled and experienced Texas Attorney. He well knew that it was the *duty* of the trial judge to hear courteous objections to the procedure of the trial judge, whether tenable or not (*McLellan* v. *Brownsville Land & Irrigation Co.*, 46 Tex. Civ. App. 249, 103 S.W. 206) and yet counsel sat by while the jury was empanelled in the criminal case, the indictment was read, and the confession was read, as well as all other proceedings transpiring before the jury retired (Tr. 32-35). Clearly, Petitioner waived its objections to the course taken, 41B Tex. Jur. 160, Sec. 134.

CONCLUSION.

At the risk of repetition, we assert again that the sole issue in this case was the extent and severity of Respondent's injuries and what amount of money would, in law,

compensate him therefor. The verdict finding the amount was within the peculiar province of the jury under either state or federal practice, subject only to review in the state court for excessiveness, or to review in this court for "monstrosity" (*Affolder* v. *N. Y. C. & St. L. R. Co.*, 339 U.S. 96, 70 S. Ct. 509, 94 L. Ed. 683). The claim of excessiveness has long since been abandoned.

We repeat again that the petition for certiorari is frivolous and pray its denial; and so believing, we have filed, simultaneously with this brief, a motion under Supreme Court Rule 56, Paragraph 4, praying that this court adjudge to the respondent reasonable damages for his delay by reason of the application for the writ.

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By: C A Brian,
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I, C. A. BRIAN, one of the attorneys for the Respondent in the above case, hereby certify that a true copy of the foregoing brief was on this 15 day of January, A. D. 1958, duly mailed to Mr. A. L. Buford, 800 Texarkana National Bank Building, Texarkana, Texas, and to Mr. L. L. Bowman, Jr., 401 Citizens National Bank Building, Greenville, Texas, Counsel of record for Petitioner.

C A Brian